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81-2116
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETTIBONE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in adopting the National Labor Relations Board's *Wright Line* standard, which provides that once the Board's General Counsel makes a *prima facie* showing that conduct protected by the National Labor Relations Act was a motivating factor in an employer's decision the employer must *prove* that it would have made the same decision in the absence of the protected conduct.

2. Whether the Seventh Circuit erred in enforcing the National Labor Relations Board's conclusion that Petitioner refused to rehire five former employees because they engaged in protected activities where there is no direct record evidence and it is unreasonable to assume that the decision-makers were aware of the protected activities, and where there is no record evidence of disparate treatment.

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v.

NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, PETTIBONE CORPORATION ("Petitioner" or "the Company"),[1] respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 15, 1982.[2]

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[1] Pursuant to Rule 28.1 of the Rules of the Court, Petitioner states that it has no parent company and that the following entities are its subsidiaries and/or affiliates: Barko Hydraulics, Inc.; Beardsley & Piper Division; Cleveland Frog & Crossing Company; Hammermills, Inc.; Hanson Machinery Co.; Johnston & Jennings Division; National Iron Division; Pettibone Alabama Division; Pettibone (Canada) Limited; Pettibone Credit Corporation; Pettibone De Mexico, S. A. de C. V.; Pettibone International Sales Corp.; Pettibone Mercury Corporation; Pettibone Michigan Corporation; Pettibone New York Division; Pettibone Ohio Corporation; Pettibone Texas Corporation; Pettibone Westrac Division; and Universal Engineering Corporation.

[2] The Company filed a timely Petition for Rehearing on March 29, 1982. The order denying that Petition, dated April 13, 1982, is reproduced herein as Appendix C.

REFERENCE TO OPINIONS BELOW

The opinion of the Court of Appeals is unpublished; it is reproduced herein as Appendix A. The opinion of the National Labor Relations Board ("the Board") is reported at 255 N.L.R.B. No. 151 and is reproduced herein as Appendix B.

JURISDICTION

The Company sought review of the Board's decision in the Court of Appeals pursuant to the provisions of 29 U.S.C. § 160(f)(1976). The judgment of the Court of Appeals was entered on March 15, 1982.[3] On March 29, 1982, the Company filed a timely Petition for Rehearing, which was denied on April 13, 1982 (C1). On April 22, 1982, the Court of Appeals granted the Company's Motion for a stay of its mandate to and including May 20, 1982. The order granting the stay is reproduced herein as Appendix D. This Petition for Certiorari was filed within ninety days of the denial of the Petition for Rehearing in accordance with the requirements of 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved are section 7(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 556(d); sections 7, 8(a)(1), 10(c) and 10(f) of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. §§ 157, 158(a)(1), 160(c) and 160(f); and the Board regulation cited as 29 C.F.R. § 101.10(b)(1981). They are reproduced herein as Appendix E.

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[3] Although Daisy Frison, Delores Jones, Corene Jones, Pandora Mitchell and Barbara Thomas were parties to the proceedings before the Board, they were not parties to the proceedings before the Seventh Circuit.

STATEMENT OF THE CASE

In its decision below, the Board found that Petitioner, a large manufacturer of heavy industrial equipment (B4, 10), violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), in two ways. First, the Board found that on April 5, 1979 Company Operations Manager Michael Lanphier violated section 8(a)(1) by threatening six Company keypunchers, who were not and had never been the subject of a union organizing campaign (Tr. 231-33), after *they* threatened not to work during a busy work period, vociferously complained about working conditions and asked for a raise (B4-6). Specifically, the Board found that, in response to the keypunchers' verbal attack on him, Lanphier became angry with the keypunchers, told them that their raise request would go against them, that "management" was upset, that they were free to leave, and that he could replace the whole department (B5-6).

Second, the Board found that on or about April 19, 1979, after the keypunchers engaged in a two-day "sick-out" on April 9 and 10 to protest working conditions, and after five of them voluntarily quit without giving any prior notice and thereafter requested rehire,[4] Corporate Division Controller Michael Craig and Vice-President Thomas Cavendar violated section 8(a)(1) by refusing to rehire the five keypunchers because of their activities protected by Section 7 of the Act (presumably, their April 5 complaining, and April 9 and 10 "sick-out") (B6-12).[5] To support its conclusion that Craig and Cavendar were motivated by the keypunchers' protected activities when they

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[4] One keypuncher was not a party to the Board proceedings and was not afforded any individual relief by the Board.

[5] Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157.

refused to rehire them, the Board relied on Lanphier's alleged threats and its finding that Craig and Cavendar's proffered reason for refusing rehire — namely, that the keypunchers quit without giving prior notice in violation of Company policy — was a pretext (B10-12). However, the Board did not specifically find that either Craig or Cavendar were even aware of the keypunchers' protected activities.

On March 15, 1982, the Seventh Circuit enforced the Board's decision in full. Despite the absence of direct evidence in the record to support a finding that Craig or Cavendar knew of the keypunchers' protected activities, the court concluded that they had such knowledge (A2). The court then upheld the Board's findings that Craig and Cavendar's proffered reliance on the notice policy to refuse rehire was a pretext and that Craig and Cavendar decided not to rehire the keypunchers because of their protected activities (A2-3).

On March 29, 1982, Petitioner filed a Petition for Rehearing with the Seventh Circuit arguing, *inter alia*, that its decision to enforce the Board's finding that Craig and Cavendar's refusal to rehire the keypunchers was motivated by protected activities is irreconcilable with its decision in *NLRB v. Pfizer*, 629 F.2d 1272 (7th Cir. 1980) (*per curiam*), wherein the Court denied enforcement of a Board finding of illegal motive in a refusal to hire context. On April 13, the Seventh Circuit denied the Company's Petition for Rehearing (C1), but, on April 22, stayed the issuance of its mandate to and including May 20, 1982 (D1). Petitioner now seeks review by this Court of the Seventh Circuit's decision insofar as it concerns the propriety of Craig and Cavendar's refusal to rehire decision.[6]

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[6] Although the Company contests the validity of the Board's finding that Lanphier made illegal threats, the Company does not urge that error as a basis for review before this Court.

REASONS FOR GRANTING THE WRIT

A.

The Seventh Circuit's Approval Of The *Wright Line* Standard Is In Conflict With Decisions Of This Court And Other Courts Of Appeals, And Presents A Question Which Has A Dramatic Impact On The Administration Of The Act.

This case presents the critical question of what burden of proof an employer must sustain to defend successfully an allegation that activity protected by section 7 of the Act illegally motivated an employment decision.[7] In *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, ____ U. S. ____, 109 L.R.R.M. 2779 (1982), the Board attempted to set forth the allocation of burdens and order of presentation of proof in an illegal motive case under the Act. *Wright Line* requires that General Counsel of the Board make a *prima facie* showing that protected conduct was a motivating factor in the employer's decision, and, once this is established, that the employer *prove* (i.e., the employer has the burden of persuasion) that it would have made the same decision in the absence of protected conduct. *Id.*, 251 N.L.R.B. at 1089, 1084 n.5, 1088 n.11. The

[7] While Petitioner did not raise this issue below, consideration of issues not presented in a Court of Appeals is not beyond this Court's power of review and such issues have been addressed by this Court in appropriate circumstances. *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980); *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980); *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 320 n.6 (1971); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 66, 68-69 (1938). Moreover, where, as here, there has been a recent, significant change in the law, this Court frequently has allowed parties to raise before it an issue for the first time. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-145 (opinion of Harlan, J.), 172 n.1 (separate opinion of Brennan, J.) (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Uebersee Finanz-Korp., A.G. v. McGrath*, 343 U.S. 205, 213 (1952); *Hormel v. Helvering*, 312 U.S. 552, 556-557 (1941). Thus, Petitioner submits that this issue is properly before the Court.

Seventh Circuit adopted the *Wright Line* standard in *Peavey Co. v. NLRB*, 648 F.2d 460 (7th Cir. 1981), and applied *Peavey* in this case (A3).

The Board's *Wright Line* standard is of considerable importance because the allocation of the burden of proof can make the difference in a close case. In point of fact, the evidence in this case is so weak and insubstantial, *see, infra*, pp. 10-15, that the Board's finding that Craig and Cavendar were illegally motivated in their refusal to rehire decision surely would have been otherwise had the burden of proof not transferred to Petitioner. The Board itself in *Wright Line* recognized that many close cases turn on the allocation of the burden of proof: "This distinction [whether General Counsel or the employer has the burden of proof] is a crucial one since the decision as to who bears this burden can be determinative." *Wright Line*, 251 N.L.R.B. at 1087.

The Board's attempt in *Wright Line* to shift the burden of proof onto the employer conflicts dramatically with General Counsel's statutory burden as defined by section 10(c) of the Act, 29 U.S.C. § 160(c), to prove an unfair labor practice by a preponderance of the evidence. The Board interprets section 10(c) to mean that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act." 29 C.F.R. § 101.10(b). Moreover, section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), mandates: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

Notwithstanding that these statutory and regulatory provisions clearly require General Counsel, and not the employer, to prove that the employer's anti-section 7 animus was the cause of its decision, the *Wright Line* analysis places on the employer the burden of disproving that fact. Under *Wright Line*, an employer who advances a legitimate reason for its decision but does not satisfy the burden of persuasion would be found in

violation of the Act, despite the fact that the Board never determined which reason was the cause of the employer's decision.

Recognizing that the Board's attempt to shift the burden of proof onto the employer is directly contrary to section 10(c) of the Act, as well as to the Board's own regulations, the Court of Appeals for the Third Circuit in *Behring International, Inc. v. NLRB*, ___ F.2d ___, 109 L.R.R.M. 3265, 3269 (3d Cir. 1982), recently concluded that "[t]he Board . . . has no [statutory] power to shift that burden onto the employer." The Court of Appeals for the First Circuit in *NLRB v. Wright Line*, 662 F.2d at 904, similarly noted: "[W]e disagree with the Board on the narrow issue of defining the exact nature of the burden which the employer thus acquires. Section 10(c), as well as the Board's own regulation, make clear that the general counsel must prove the employer's guilt by a preponderance of the evidence . . . ." *Id.* at 904. The First Circuit in *NLRB v. Transportation Management Corp.*, ___ F.2d ___, 109 L.R.R.M. 3291, 3292 (1st Cir. 1982), recently reaffirmed that it has "rejected . . . any effort by the Board to impose a greater burden than . . . [neutralizing the implication of sufficient anti-section 7 motive] upon the Company, as outside the Board's statutory authority."

Departing from the *Wright Line* test, both the First and Third Circuits concluded that the more appropriate test is found in this Court's recent decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *Burdine* reaffirmed the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Burdine* at 252-56. Applying the *Burdine* formula by analogy, once General Counsel proves a *prima facie* violation of the Act, the employer need only articulate a legitimate reason for its actions, and unless General Counsel proves that the proferred reason was a pretext, the employer will prevail.

The employer does *not* have the burden of persuading the trier of fact that it relied on the proferred reason. The burden of persuasion never shifts from General Counsel. *Behring International,* 109 L.R.R.M. at 3270; *Wright Line,* 662 F.2d at 906-07; *Transportation Management Corp.,* 109 L.R.R.M. at 3292. Since "[d]iscrimination in employment because of race, religion, or nationality is often as subtle and as difficult to ferret out as that resulting from antiunion [or anti-section 7] bias," the court in *Behring International* rightly concluded that the Board should follow the *Burdine* procedure. *Behring International,* 109 L.R.R.M. at 3269.

That this case presents an important question is further evidenced by the fact that there is a split in the circuits on the issue of whether the burden of persuasion shifts to the employer once General Counsel proves a *prima facie* violation of the Act. While some courts of appeals have upheld the Board's practice of imposing the burden of persuasion on the employer, *Red Ball Motor Freight, Inc. v. NLRB,* 660 F.2d 626 (5th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3742 (U.S. March 1, 1982) (No. 81-1605) (*Wright Line* question raised in petition for certiorari); *NLRB v. Fixtures Mfg. Corp.,* 669 F.2d 547 (8th Cir. 1982); *NLRB v. Consolidated Freightways,* 651 F.2d 436 (6th Cir. 1981); *Peavey* (7th Cir.); *NLRB v. Nevis Industries, Inc.,* 647 F.2d 905 (9th Cir. 1981), other courts of appeals, as noted earlier, have expressly rejected the burden-shifting aspect of the *Wright Line* test. *Behring International* (3d Cir.); *Transportation Management* (1st Cir.); *Wright Line* (1st Cir.).[8]

Moreover, it must be noted that this Court granted certiorari in *Myers v. Connick,* 507 F. Supp. 752 (E.D. La.), *aff'd. without op.,* 654 F.2d 719 (5th Cir. 1981), *cert. granted,* ____

[8] Additionally, the Fifth Circuit in *TRW, Inc. v. NLRB,* 654 F.2d 307 (5th Cir. 1981) implicitly rejected the *Wright Line* burden-shifting analysis.

U.S. ____, 102 S.Ct. 1629, 50 U.S.L.W. 3708 (1982). One of the questions this Court will review in that case is whether, in a public employment context, the lower court erred in applying the allocation of burdens and order of presentation of proof enunciated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), rather than the *Burdine* standard. *Myers*, 50 U.S.L.W. at 3708. Since the *Mt. Healthy* standard was adopted by the Board as the basis for *Wright Line*, 251 N.L.R.B. at 1089 (notwithstanding that none of the statutory or regulatory provisions with which the Board must comply were relevant in *Mt. Healthy*), this Court has decided to review the very issue presented herein, only in a public employment context. Obviously, private employers like public employers are victims of the same confusion over application of the *Wright Line/Mt. Healthy* standard versus the *Burdine* standard,[9] and private employers like public employers would benefit greatly from this Court's resolution of that confusion.

In sum, the Court's review of the propriety of the *Wright Line* standard in this case is important not only to Petitioner but also to employers generally, and is necessary to resolve a split in the circuits and ensure the consistent and evenhanded interpretation of the Act. Accordingly, Petitioner submits that the *Wright Line* issue merits this Court's review.

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[9] In the instant case, both the Board's decision and its brief to the Seventh Circuit mischaracterized the *Wright Line* test. The Board reversed the *Wright Line* order of proof in its decision by addressing first the issue of pretext and second General Counsel's evidence of illegal motive (B10-12; Company Brief 27-30), and then incredibly misstated the *Wright Line* test in its brief by arguing that Petitioner had the burden of proving that its reason was "legitimate" and "something more than a pretext" in addition to proving that it would have taken the same action absent the keypunchers' protected conduct (Board Brief 28-29; Company Reply Brief 7-8). Obviously, the Board is confused about its own standard to the detriment of Petitioner and employers generally. This confusion justifies this Court's attention.

B.

The Seventh Circuit's Decision That The Board's Illegal Motive Finding Was Supported By Substantial Evidence Is In Conflict With The Decisions Of This Court, The Seventh Circuit Itself And Other Courts Of Appeals, And Presents A Question Important To The Administration Of The Act.

A Board finding of illegal motive must be rejected not only if it is based on a refutation of the Board's statutory burden of proof, but also if it is not "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(f). Substantial evidence is more than a "mere scintilla." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). To support a conclusion of a violation of the Act, the Board's illegal motive finding must be based on more than mere suspicion or speculation. *Universal Camera*, 340 U.S. at 477. It goes without saying that the courts will not lightly infer the existence of unlawful motive on the part of an employer. *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 30 (7th Cir. 1980).

Obviously, a record does not support a finding that an employer was motivated by section 7 activity in discharging an employee if it lacks evidence that the decision-maker had knowledge of that activity. *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 722 (5th Cir. 1973); *NLRB v. Mid-State Sportswear, Inc.*, 412 F.2d 537, 539 (5th Cir. 1969). This reasoning applies as well in a refusal to hire case. *Pfizer*, 629 F.2d at 1275. In certain cases, knowledge of section 7 activity may be imputed to the employer official who decides to discharge or not to hire. For example, the "small plant doctrine" provides that the small size of an employer, under certain circumstances, may justify imputing knowledge of section 7 activity. *Coral Gables Convalescent Home, Inc.*, 234 N.L.R.B. 1198, 1199 (1978). However, this doctrine clearly does not apply to this case because the Company is not a small

employer. In 1979, Petitioner employed approximately 1,200 employees at its Chicago plant, where the alleged unfair labor practices occurred, and many if not most of the employees had been represented by eight different unions for decades (B10; Tr. 231-33).

As the Seventh Circuit recognized, "[T]here is no direct evidence that Craig and Cavendar, the persons who made the decision not to rehire, were aware of the keypunchers' protected, concerted activities" (A2). Nonetheless, the court concluded that such knowledge could be inferred circumstantially for three reasons: (1) Lanphier reported the keypunchers' requests about working conditions to "management" on April 5 and Craig and Cavendar ranked above Lanphier in the line of managerial supervision, (2) neither Craig nor Cavendar testified that they were unaware of the keypunchers' activities and (3) the "sick-out" apparently disrupted operations and required borrowing employees from other departments (A1-2). These reasons simply do not satisfy this Court's substantial evidence standard: (1) Lanphier's reporting to "management" more likely referred to Company Overall Manager for Systems and Computer Room Thomas Nast, his immediate supervisor who also met with the keypunchers before they quit, than to Craig or Cavendar, his distant superiors who never even spoke with the keypunchers before they quit (B7; Tr. 212-14, 219), (2) the failure of Craig and Cavendar to disprove their knowledge is meaningless because the *Board* had the burden of proof of knowledge, and (3) Petitioner's large size belies the notion that a two-day absence of and substitution for six employees would be known by top management.

Even more tenuous is the Seventh Circuit's conclusion that Craig and Cavendar *relied* on the keypunchers' protected activities to deny them rehire (A2-3). Substantial evidence of reliance, in the Seventh Circuit's view, was "the background of Lanphier's recent unlawful conduct" and the facts that the

Company notice policy, on which Craig and Cavendar said they relied, was unwritten or not communicated to employees, Company supervisor Earline Elam was unaware of the policy and Company witnesses did not testify as to the policy's age, origin or precise working details (A2-3). However, Lanphier's conduct offers no support for a finding of illegal motive on Craig and Cavendar's part because there is no record evidence that Craig and Cavendar even knew of Lanphier's conduct. The alleged threats and the refusal to rehire were two separate events involving different management representatives. *See NLRB v. P.P.G. Industries, Inc.*, 579 F.2d 1057, 1060 (7th Cir. 1978) (employer legitimately refused rehire where decision-maker and supervisor who claimed applicant for rehire had filed "harassing" grievances were not the same person).

The unwritten aspect of the Company notice policy likewise is not determinative. *See Stone & Webster Engineering Corp. v. NLRB*, 536 F.2d 461, 466 (1st Cir. 1976) (employer legitimately relied on unwritten rationale). That the policy was unwritten and the fact that the notice policy was not communicated to employees is eminently understandable given the common sense notion recognized by the *Board* that an employer should not rehire an employee who quits without giving notice, leaving the employer in the lurch, lest the employee repeat his transgression, *Nutrena Mills Cargill, Inc., Nutrena Mills Division*, 172 N.L.R.B. 183, 190 (1968); *see also NLRB v. Rich's of Plymouth, Inc.*, 578 F.2d 880, 887 (1st Cir. 1978) (employer's unwillingness to rehire employee who quit without notice is understandable), and the obvious inappropriateness of an employer's discussing quitting with employees at the beginning of or during their term of employment. That Elam was unaware of the policy is insignificant because there were few examples of employees quitting without giving notice and then asking to be rehired, and because Elam was not responsible for the rehire decision (B7-9; Tr. 296). Finally, contrary to what the Seventh Circuit concluded, the Board's decision and the

uncontradicted record evidence reveal that the Company notice policy was long-standing, known by three Company managers who testified at the hearing, and applied in other cases; and the record is clear that those witnesses testified uniformly that the notice policy's details applied precisely in *this* case since the keypunchers gave no notice whatsoever before quitting (B7-ll; Tr. 212-20, 224, 231-34, 241-42, 266, 268-72).

Noticeably absent from the record and the decision of the Seventh Circuit is evidence of disparate treatment in the application of the Company notice policy (i.e., evidence that former employees of Petitioner who quit without giving any notice and without having engaged in protected activity *were* rehired). Disparate treatment is the essence of an illegal motive case. *NLRB v. Charles Batchelder Co.*, 646 F.2d 33, 40-4l (2d Cir. 1981); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1259-60 (7th Cir. 1980); *Delco-Remy Division, General Motors Corp. v. NLRB*, 596 F.2d 1295, 1305 (5th Cir. 1979); *cf. Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (Title VII discrimination). The absence of disparate treatment evidence reinforces the need for the Court's review.

The lack of substantial evidence is all the more obvious by the fact that the Seventh Circuit's decision in *Pfizer*, wherein the court denied enforcement of a Board decision, is irreconcilable with the Seventh Circuit's decision herein. In *Pfizer*, applicant Houstin Alexander was favorably interviewed by James Murphy, company personnel manager. After the interview, Murphy asked John Watts, industrial relations supervisor, to check Alexander's references. Watts solicited the opinion of Sharon Bauer, industrial relations supervisor of Alexander's previous employer, who told Watts that she could not speak favorably of Alexander's ability and job performance, that Alexander was an "ex-president of the Union who tends to be an instigator" and that he was a "troublemaker." *Pfizer* at 1274. Finally, Bauer advised Watts that he stay away from Alexander if Watts didn't "need further problems." *Id.*

Murphy testified that Watts told him that Alexander had had performance problems and had been a union president. Murphy thereafter decided not to hire Alexander, testifying that his reason for doing so was because it was his personal policy not to hire an applicant whose prior employer would not rehire him. The court cited no evidence that Murphy's policy was written or communicated to employees and supervisors; in fact, because the policy was unique to *Murphy*, not his company, *id.* at 1274, the policy was unwritten and not disseminated. Moreover, the court cited no evidence of the age or origin of Murphy's policy, and Murphy's statement and testimony about the general working details of the policy were inconsistent and therefore imprecise. *Compare id.* at 1274 *with id.* at 1276.

Thus, in *Pfizer*, decision-maker Murphy refused to hire an applicant whom (according to his direct testimony) Murphy knew to have been engaged in section 7 activities; herein, decision-makers Craig and Cavendar refused to hire the keypunchers and there is no record evidence of their knowledge of the keypunchers' section 7 activities. In *Pfizer*, Murphy's policy rationale was unique to him and thus unwritten and not disseminated, and its age, origin and precise working details were unknown; herein Craig and Cavendar's policy rationale was unwritten but was long-standing and known by three Company managers who substantiated its precise application in this case. In *Pfizer*, the Seventh Circuit found substantial evidence lacking and concluded that Murphy's decision was "fully consistent with benign conduct," *id.* at 1277; it thus must follow *a fortiorari* that there is no substantial evidence for the conclusion that Craig and Cavendar's decision was illegally motivated.

In sum, this case presents not only the question whether the Board can refute its statutory burden of proof obligation but also the question whether the Seventh Circuit failed to comply with this Court's *Universal Camera* substantial evidence standard. To ensure that the substantial evidence requirement is

not replaced by a standard of mere suspicion and speculation, and to resolve the conflict between this case and the decisions noted earlier, especially the Seventh Circuit's own decision in *Pfizer, see Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (certiorari granted because of intracircuit conflict), this Court should grant review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted

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